No. 80-1094

IN THE

Supreme Court of the United States

October Term, 1980

BURLINGTON NORTHERN, INC., a corporation,
Petitioner,

vs.

EDWARD L. FLANIGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Rerat Law Firm, P.A.
John C. Boylan, Esq.
Frederic A. Bremseth, Esq.
790 Galaxy Building
330 Second Avenue South
Minneapolis, Minnesota 55401
612-371-8900

1981—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1094

BURLINGTON NORTHERN, INC., a corporation,
Petitioner,

vs.

EDWARD L. FLANIGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The order of the Court of Appeals is printed in the petition appendix at A-1 through A-19; the opinion is reported at 632 F.2d 880 (8th Cir. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered September 4, 1980, and an order denying rehearing and rehearing en banc was entered October 16, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that it was harmless error in this FELA case for the District Court not to have given a non-taxability jury instruction.

STATUTES AND RULES INVOLVED

Certain statutes are set out in the petition at 2-3. In addition, 28 U.S.C. §2111, entitled "Harmless Error" is relevant. It provides:

> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

And Fed. R. Civ. P. 61, also entitled "Harmless Error,' is relevant. It provides:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

STATEMENT

The facts are fully developed in the opinion of the Court of Appeals. Pet. Appendix, A-1 through A-19; 632 F.2d 880 (8th Cir. 1980).

ARGUMENT

1. *There is no conflict among Courts of Appeals on the applicability of Liepelt to cases on appeal at the time it was decided.* Resolving a long-standing conflict among Courts of Appeals, this Court, in February, 1980 held that it was error not to give a requested instruction that FELA awards were non-taxable. *Norfolk v. Western Ry. v. Liepelt,* — U.S. —, 100 S. Ct. 755, 62 L.Ed.2d 698 (1980). The case was for wrongful death; plaintiff's expert put the future loss at $302,000.00 and the jury awarded $775,000.00. This Court said, "We hold that it was error to refuse the requested instruction in this case" and remanded for "further proceedings consistent with this opinion." Pet. A-36.

Petitioner admits that the Court of Appeals did apply the new *Liepelt* law to cases pending on appeal when that decision was announced. Pet. 5-6; 632 F.2d at 887. But petitioner claims that the way *Liepelt* was applied by the Eighth Circuit creates a conflict with the Fourth and Fifth Circuits and other courts. Pet. 8-11. Specifically, petitioner contends that the Court of Appeals for the Eighth Circuit "engrafted" a harmless error rule onto the *Liepelt* decision. Pet. 9.

There is no true conflict. The case from the United States Court of Appeals for the Fifth Circuit, *Lange v. Texas & Pacific Ry. Co.,* 624 F.2d 1275 (5th Cir. 1980) is easily distinquished. That was a wrongful death action where the jury awarded $913,000.00 and the District Court remitted to $600,000.00. The case is virtually identical to *Liepelt*. There was no harmless error because the verdict was so high that one could reasonably suspect that the jury erroneously thought the award was taxable.

That is exactly what this Court did in *Liepelt*, Pet., A-35; see also, A-40-41, Blackmun, J. dissenting. In *Lange*, unlike the present case, it was clear that the jury was operating under some misconception because the verdict greatly exceeded the damage evidence of plaintiff's own economist.

The case from the United States Court of Appeals for the Fourth Circuit, *Cazad v. Chesapeake & Ohio Railway Co.*, 622 F.2d 72 (4th Cir. 1980) is also distinguishable. It was an injury action but the injuries to the plaintiff were not described in detail. There is no discussion of harmless error. It is not unreasonable to suspect that the plaintiff obtained a generous verdict and, therefore, conceded that any error was not harmless.

More importantly, neither case disavows the applicability of the harmless error rule to these cases. Indeed, since the rule is based on statute, 28 U.S.C. §2111, and a rule of civil procedure, Fed. R. Civ. P. 61, it cannot so easily be dislodged. Finally, it is wrong to say that this Court's *Liepelt* decision mandates vacation of all verdicts where a non-taxability instruction was refused. This Court merely said that "it was error to refuse the requested instruction *in this case*." A-36. (emphasis added).

2. *The application of "harmless error" by the Court of Appeals here is based on statute, rule and caselaw.* Without even citing the controlling statute or rule regarding "harmless error" petitioner argues that application of the doctrine here is totally without precedent. Pet. 8, passim. In fact, long-standing caselaw supports the Eighth Circuit's conclusion.

The Court of Appeals described the pain and suffering associated with the loss of respondent's leg noting that

it was an element of damages "in addition to being compensated for loss of future income." Pet. App., A-18; 632 F. 2d at 890. The Court concluded the $500,000.00 verdict was not based on an erroneous impression of non-taxability:

> "Consi ering plaintiff's pain and suffering, his medical expenses as well as his loss of earning potential, the verdict does not indicate that the jury erroneously speculated that plaintiff's award would be subject to income tax." *Id.*

The decision is a routine application of Fed. R. Civ. P. 61 to an erroneous failure to give a jury instruct on regarding damages.

Under 28 U.S.C. §2111, Courts of Appeals "shall give judgment after an examination of the record without regard to errors . . . which do not affect the substantial rights of the parties." That section is mandatory and envisions exactly the inquiry made by the Eighth Circuit here.

Contrary to petitioner's contention that the Eighth Circuit "engrafted" the harmless error rule on *Liepelt*, courts of appeals for years have applied it to erroneous failures to give damage instructions. The key has always been that a verdict was not excessive. E. g., *Guido v. Hudson Transit Lines, Inc.*, 178 F.2d 740 (3rd Cir. 1950); *Huse v. Consoidated Freightways, Inc.*, 227 F.2d 425 (7th Cir. 1956); *Biggans v. Hajoca Corp.*, 18 F.2d 982 (3rd Cir. 1951).

A classic example of such application is *Brett v. United States*, 86 F.2d 305 (9th Cir. 1936), *cert. denied*, 301 U.S. 682, 81 L.Ed. 1340, 575 Ct. 732, where the failure

to give a defendant's damage instruction in a condemnation case was held to be harmless error because there was no indication that the jury erroneously increased the value. (Applying Section 2111).

Moreover, the rule has long been applied in FELA cases where the District Court erroneously failed to give a non-taxability instruction. *McWeeney v. New York, N. H. & H. R. Co.*, 282 F.2d 34 (2d Cir. 1960) (requiring evidence that the jury erroneously increased the recovery before failure to give the instruction would be reversible.); *Domeracki v. Humble Oil & Ref. Co.*, 443 F.2d 1245, 1252 and n. 15 (3rd Cir. 1971); *Cullinan v. Burlington Northern, Inc.*, 522 F.2d 1034 (9th Cir. 1975); *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 296 and n. 15 (9th Cir. 1975).

Finally, the two courts of appeals that petitioner contends are in conflict here, the Fourth Circuit and the Fifth Circuit, actually are in agreement with the Eighth Circuit that the harmless error rule applies to failures to give jury instructions regarding damages. E. g., *Smith v. Brady*, 390 F.2d 176 (4th Cir. 1968); *Wallace v. Ener*, 521 F.2d 215 (5th Cir. 1975); see also, *Gillentine v. McKeand*, 426 F.2d 717 (1st Cir. 1970).

3. *The issue here is not a proper subject for plenary review.* There are two significant reasons why this Court should not expend its limited time to review this case. First, the issues will not arise again. All of the cases petitioner alleges conflict with this case, and this case itself, have one thing in common: they were on appeal when *Liepelt* was decided. The number of cases involved is few and they will not arise again.

In the future, defendants in FELA cases will request the non-taxability instruction, citing *Liepelt;* trial courts will give the instruction on that authority. Never again will the question arise whether it was harmless error not to give the non-taxability instruction.

Second, application of the harmless error rule inevitably involves a fact-specific inquiry on a case-by-case basis. And application of the rule is part of the error correcting function of the courts of appeals. This Court must, as a matter of sound administration of justice, leave that task to those courts. The question of whether the harmless error rule was correctly applied in any one case is not a question of law for this Court.

CONCLUSION

Absent from the petition is any contention that the award was excessive. That is because the award was fair and reasonable for the pain and suffering, loss of past and future income and disability suffered by respondent. The jury simply did not inflate its award assuming it to be taxable. The failure to give the instruction was harmless.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RERAT LAW FIRM, P.A.
By John C. Boylan, Esq.
By Frederic A. Bremseth, Esq.
790 Galaxy Building
330 Second Avenue South
Minneapolis, Minnesota 55401
612-371-8900